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IN THE

Supreme Court of the United States

OCTOBER TERM 1951

J. OWEN ROBINS, individually, and doing business under the name and style of ROBINS TRANSFER COMPANY,

Petitioner,

Vs.

ATLANTIC COAST LINE RAILROAD COMPANY, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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Brunet v. **S. S. Kresge Co.** (CCA 7th 1940) 115 F. 2d 713.

Central of Ga. R. R. v. **Pruden** (1926) 21 Ala. App. 280, 107, So. 716.

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Lowery v. **Seaboard Airline R. R. Co.** (1948) 171 F. 2d 625.

Miller's Mut. Fire Ins. Assn. v. **Warrood** (CCA 8th 1938) 94 F. 2d 741.

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Miller v. **Union Pacific R. R. Co.** (1933) 290 U. S. 227, 54 S. Ct. 172, 78 L. Ed. 285.

Mutual Bur. Health & Acc. Assn. v. **Thomas** (CCA 8th 1941) 123 F. 2d 353.

Slocum v. **N. Y. Life Ins. Co.** (1913) 228 U. S. 364, 33 S. Ct. 523, 57 L. Ed. 879.

Southern R. R. Co. v. **Shelton** (1903) 136 Ala. 212, 34 So. 194.

Sucrerie Central Coloso de Porto Rico v. **Fajardo** (CCA 1st 1918) 248 Fed. 432.

Tennant v. **Peoria & Pekin Union R. Co.** (1943) 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520.

Thompson & Donahoo v. **Mobile & O. R. R. Co.** (1924) 211 Ala. 646, 101 So. 441.

U. S. v. **Holliday** (CCA 4th 1941) 116 F. 2d 812.

F. W. Woolworth Co. v. **Davis** (CCA 10th 1930) 41 F. 2d 342.

Young v. **Central R. R. of N. J.** (1914) 232 U. S. 602, 34 S. Ct. 541, 58 L. Ed. 750.

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TO THE HONORABLE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, J. OWEN ROBINS, individually, and doing business under the name and style of ROBINS TRANSFER COMPANY (hereinafter at times called "Robins"), respectfully prays that a Writ of Certiorari be issued out of and under the seal of this court to review the decision of the United States Circuit Court of Appeals, for the Fifth Circuit, rendered on November 13, 1951, as amended by said court on December 20, 1951, which reversed a judgment of the District Court of the United States for the Southern Division of the Northern District of Alabama, entered on September 20, 1950, and remanded the cause to the District Court with directions to enter a judgment for

the Atlantic Coast Line Railroad Company, not-withstanding Robins' demand for a trial by jury.

OPINIONS BELOW

The opinion of the Court of Appeals, as amended, is reported in 192 Federal 2d 657, and is also printed in the record (R. 309-312).

The judgment of the District Court for the Southern Division of the Northern District of Alabama, entered pursuant to the amended mandate of the Court of Appeals is printed in the Record (R. 313-314).

JURISDICTION

Jurisdiction to review this cause upon Writ of Certiorari is conferred upon this court by Title 28, U.S.C., Secton 1254 (1).

The opinion of the Court of Appeals for the Fifth Circuit was filed November 13, 1951. The petitioner's (appellee, in court below) application for rehearing was denied on December 10, 1951 (R. 312), and the opinion of the court, of November 13, 1951 (R. 289-290) was amended on December 20, 1951 (R. 312). Upon petition seasonably filed under and pursuant to Title 28, U.S.C., Section 2101 (c), an order was entered by this court on February 25, 1952 (R. 314), extending the time within which to apply for Writ of Certiorari to and including May 7, 1952 (R. 314).

FEDERAL RULES OF CIVIL PROCEDURE, STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case and the issues here presented involves the application and construction of the 7th Amendment to the Constitution of the United States which provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

The provisions of Rule 50 (b) of the Federal Rules of Civil Procedure are as follows:

> "Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within ten days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or, if a verdict was not rendered, such party, within ten days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned, the court may allow the judgment to stand or may reopen the judgment

and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned, the court may direct the entry of judgment, as if the requested verdict had been directed, or may order a new trial."

SUMMARY STATEMENT

Respondent, Atlantic Coast Line Railroad Company (hereinafter at times called "Respondent," or "The Railroad") filed its complaint in the United States District Court for the Southern Division of the Northern District of Alabama against the petitioner, Robins, claiming damages to respondent's property, equipment and cargo, as the result of a wreck between one of respondent's trains and a gasoline tractor-tank trailer of the petitioner at a public crossing in the City of Birmingham, Alabama, on December 6, 1949 (R. 1). The Railroad charged the truck driver of the petitioner with negligence and wanton conduct, and the petitioner filed a counter-suit against the Railroad for damages to his equipment and charged the Railroad with subsequent negligence, wantonness and subsequent contributory negligence (R. 7).

It was undisputed that the accident occurred at a crossing where the Railroad had placed the usual crossarm railroad sign and blinker lights, which were in operation at the time of the accident. Both the driver of petitioner's truck (who was killed in the accident) and the engineer and conductor of respondent's train were thoroughly familiar with this heavily traveled crossing (R. 184, 201). Petitioner's driver was operat-

ing a tractor-tank trailer unit loaded with gasoline and clearly so marked.

Whether the whistle of the train blew for the crossing or for the truck, and whether the bell on the train was ringing at the time of the collision were facts disputed, but is was undisputed that the train was violating the speed limit of 20 miles per hour at this crossing. Witnesses fixed the speed of the train from 30 to 40 miles per hour and the engineer and conductor testified positively that they were going 31 miles per hour according to the train speedometer (R. 176, 203), and that this speed was never reduced.

It appeared from the evidence that from a point some 600 feet from the railroad track, as the driver of the truck approached the track, he could have observed or noticed the approaching double Diesel engine, when the Diesel engine was approximately 900 feet from the crossing. It further appears that the truck, when some 600 feet from the track, was proceeding at a speed of 25 miles an hour and that the truck continued at this speed. The driver of the truck, Mr. Haynie, did not apply brakes or swerve to the right or left, or give any evidence that he saw or observed, or was conscious of the approaching train.

The engineer and conductor knew, as the train approached this crossing, that the highway at this crossing was heavily traveled. As the train approached the crossing,, the engineer and conductor were seated in front of the Diesel near the windshield, with the conductor to the engineer's left some three or four feet.

As it approached and entered and crossed the crossing, the Diesel was travelling at a speed of from 31 to 40 miles an hour. The engineer was conscious at the time that the speed limit at this crossing was 20 miles an hour. It further appeared, without contradiction, that the engineer never applied the brakes, which did not go on in emergency until the train had derailed at the switch, approximately 120 feet west of the crossing. The engineer testified that he first saw and observed the approaching truck when it was 600 or 700 feet from the track proceeding toward the railroad track at a speed of 25 miles an hour. The train was then 800 to 900 feet from the crossing. He watched the truck and the truck did not slow down or give any indication that it was going to stop until it passed out of his vision near the railroad track.

The conductor testified there were other vehicles approaching the crossing which stopped, but that he did not pay too much attention to them "as I was interested in the truck, I was afraid of it" (R. 221).

A witness for the plaintiff, who was on top of a house about a half block from the scene of the accident, testified:

> "Well, when I noticed the train and truck approaching this crossing I figured there would be an accident and I also saw the lights and they were flickering and it didn't seem neither one was going to stop or nothing else, but just went right on" (R. 84).

The jury returned a verdict for the defendant and

the trial judge entered judgment accordingly (R. 273). On the trial of the case and prior to argument to the jury, the District Court gave to the parties the right to dictate any motion into the record "at a later time" and reserved his "ruling on such motions" (R. 256). No motions were dictated. The Railroad seasonably filed a "motion to set aside verdict and judgment, and for entry of judgment in favor of plaintiff, not-with-standing the verdict, or for new trial" (R. 274). The motions were overruled and denied by the Trial Court (R. 279), and the respondent appealed to the Court of Appeals, Fifth Circuit (R. 280).

On November 13, 1951, the Court of Appeals, Fifth Circuit, rendered an opinion reversing the judgment appealed from, and remanding the case "to the District Court, with directions to enter judgment for the plaintiff for the amount of damages stipulated" (R. 291). On December 1, 1951, the respondent filed a motion with the Court of Appeals to clarify the direction as to the amount of damages (R. 292-295), and on December 3, 1951, the petitioner filed a petition for rehearing, etc., which was denied by the Court of Appeals on December 10, 1951 (R. 312). On December 20, 1951, the Court of Appeals **amended its opinion** and directed the District Court to enter judgment for the plaintiff "for the amount stipulated, plus such amount of its cargo and freight loss as the plaintiff may have sustained."

On January 11, 1952, the respondent filed, in the District Court, a waiver and disclaimer of any damages to its cargo and freight, and, over the objections of the petitioner, the District Court, pursuant to the mandate

of the Court of Appeals, entered a judgment for the respondent without the intervention of a jury insisted upon by the petitioner (R. 313-314).

THE QUESTIONS PRESENTED

A. The questions presented are whether the opinion of the United States Court of Appeals, Fifth Circuit, in the instant case, is in direct conflict with prior decisons of that court (**Lowery** v. **Seaboard Airline R. R. Co.**, 171 F. 2d, 625), and with prior decisions of other Circuits and of this court (**Miller** v. **Union Pacific R. R. Co.**, 290 U. S. 227, 54 S. Ct. 172, 78 L. Ed. 285) on the basic question of the sufficiency of evidence to support a jury determination on the questions of negligence and wanton conduct in a railroad crossing accident.

B. Was the defendant denied his constitutional right to trial by jury under the 7th Amendment of the Constitution of the United States where the Court of Appeals reversed a judgment of the District Court for the defendant and remanded the case with directions to enter a monetary judgment for the plaintiff, where the plaintiff, during the trial, did not file or reserve any ruling on a motion for directed verdict, under Rule 50 (b) of the Federal Rules of Civil Procedure.

C. Whether the Circuit Court of Appeals denied the petitioner of his right to trial by jury under the 7th Amendment to the Constitution of the United States by reversing a judgment for the petitioner and directing that a monetary judgment for the respondent be entered where the question of the sufficiency of the

evidence was not reserved by a motion for directed verdict, and whether, therefore, this judgment of the Circuit Court of Appeals, Fifth Circuit, should be modified by eliminating the directions for entry of judgment for the respondent and by substituting therefor a direction for a new trial.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals, Fifth Circuit, erred as follows:

A. On the first question:

1. In reversing the judgment of the District Court.

2. In over-turning the factual determination of the jury that: (a) the Railroad was guilty of initial negligence and the defendant of contributory negligence, or (b) Robins was guilty of negligence, but the Railroad was guilty of contributory negligence, or the parties were guilty of concurring negligence, or (c) the Railroad was guilty of wantonness or subsequent negligence.

3. In over-turning the factual determinations of the jury set out above and concluding that the "driver's negligence was the sole proximate cause of the collision" (R. 290).

4. In acquitting the Railroad of (a) contributory or subsequent negligence, and of (b) wantonness, in direct conflict with the verdict of a Federal jury and the judgment of an ex-

ceptionally able District Judge and numerous prior appellate court decisions.

5. In erroneously finding as a fact that petitioner's "driver drove the tank-tractor truck into the left side of appellant's Diesel engine" when the pictorial and factual evidence was to the contrary.

B. On the second and third questions:

1. In remanding the case to the District Court with instructions to enter a judgment for the plaintiff and thereby depriving petitioner of his right to trial by jury under the 7th Amendment to the Constitution of the United States since the legal sufficiency of the evidence was not reserved by the respondnt during the trial by a request for a directed verdict.

REASONS RELIED ON FOR GRANTING THE WRIT

1. The decision below is in conflict with prior decisions of that court, and with prior decisions of other circuits, and of this court on the question of the sufficiency of evidence to support a jury determination on the issues of negligence and wanton conduct in a railroad crossing accident.

2. The Circuit Court of Appeals deprived the petitioner of his right to trial by jury guaranteed by the 7th Amendment to the Constitution of the United States by remanding the case to the District Court with directions to enter judgment for the plaintiff, where the

plaintiff (appellant) filed no motion for a directed verdict and there was no ruling reserved thereon.

3. The case involves a question of procedure under Rule 50 (b) of the Federal Rules of Civil Procedure which has been decided differently among the various circuits, without any uniformity of practice, procedure or decsion.

ARGUMENT

A.

We respectfully submit that the decision in the court below is in direct conflict with prior decisions of that court, with decisions of other circuits and of this court, rendered on cases of similar, if not identical, factual circumstances. We urge a careful review of this Record will not substantiate the conclusion, as a matter of law, that the railroad was not guilty of contributory or subsequent negligence or wantonness, where the train admittedly was violating the speed limit while approaching a known heavily travelled crossing and where the engneer failed to make any effort to stop when he could have done so after it became apparent that the truck was proceeding to a point of danger.

There is abundant evidence in this record from which the jury could and did find that the railroad was guilty of subsequent negligence or wantonness. It was undisputed that the engineer and conductor saw a tractor, pulling a large gasoline tank trailer, approaching the crossing, at a speed of 25 miles per hour, from a

point approximately 700 feet from the crossing. The railroad employees confessed that the train was travelling 31 miles per hour in violation of the statutory limit, that they knew this was a heavily travelled crossing, and that the train never retarded that speed. Expert evidence was introduced that the train could have stopped had its brakes been applied at the point when it was apparent to the engineer and conductor that the truck was not going to stop. Under these circumstances, can it be said as a matter of law that the jury had no evidence on which to base their verdict?

The instant opinion is in direct conflict with the rationale of a prior decision of the Court of Appeals, Fifth Circuit, in **Lowery** v. **Seaboard Airline R. R. Co.**, 171 F. 2d 625. In that case, the plaintiff sought to recover for the alleged wrongful death of his daughter when the automobile driven by her was struck by the defendant's train at a public crossing. In the **Lowery** case, the deceased ran on to the crossing from around a large city bus which had stopped for the crossing. The court directed a verdict for the defendant and the Fifth Circuit reversed the case.

In the Lowery Case	**In the Case here Pending**
1. The accident occurred at a frequently travelled crossing, familiar both to the deceased and to the engineer.	1. The same is true.

2. The deceased ran on to the crossing from around a large city bus which had stopped for the crossing.	2. The driver proceeded to the crossing on his same course and without any indication he would stop.
3. The passenger - train proceeded 566 feet from the point of impact.	3. The train proceeded 800 feet from the point of impact (indicating a greater speed).
4. There was a cross-arm sign at the crossing, and the bell was ringing and the train whistle was blowing.	4. There was a cross-arm sign, but whether the whistle was blown for the crossing is disputed.
5. The train was violating the speed limit.	5. The same is true.

In reversing the trial court in the **Lowery** case, in a special concurring opinion, Mr. Justice Hutcheson declared:

> "Under the undisputed evidence, the negligence of Miss Lowery was so clear and so great as almost to require an instruction that it was the sole proximate cause of the injury. It was, however, not quite sufficient since there was some evidence from which it might be found that the negligence of the defendant, though slight in comparison with hers, contributed to her injury. Under these circumstances, in accordance with settled law, the verdict should not have been directed for defendant, but the case should have gone to the jury under appropriate instructions, including an instruction

that plaintiff was guilty of contributory negligence as a matter of law."

It will be noted that the opinion here in question found no error in the charge of the able District Judge. In the **Lowery** case, the court observed and declared that:

> "We are not arguing that she was without negligence, but only that she did not necessarily proceed recklessly into an evident danger, so as to make her negligence the sole proximate cause of her injury."

In the **Lowery** case, as noted, the 5th Circuit held that the question was one for the jury where the driver proceeded around a bus stopped for the crossing. This court observed that:

1. "She might have known no train was due."
2. "The halted bus may have meant to her a stop for passengers rather than for a train."
3. "She may have thought it safer to go across than to risk stopping on the track."

All those observations are equally here pertinent, and, in addition, we might also here observe, fortified by a jury verdict, that:

1. "The brakes on the tractor may have failed."
2. "The tractor motor may have stalled, or some other mechanical failure occurred."
3. "The driver may have been ill or afflicted."

4. "The driver's attention may have been directed to the left instead of the right, and a train warning whistle (not given) may have directed his attention to the on-rushing train."

As observed by this court in the **Lowery** case, Mr. Haynie, the truck driver, "cannot tell his version of it, what he saw or was trying to do."

In **Miller** v. **Union Pacific R. R. Co.**, 290 U. S. 227, 54 S. Ct. 172, 78 L. Ed. 285, the decedents, a husband and wife, were killed when the husband drove their automobile on to a railroad crossing in front of an approaching train. The Supreme Court held that the 8th Circuit Court of Appeals erred in holding, as a matter of law, that the wife was guilty of contributory negligence and in language particularly apropos, Mr. Justice Sutherland, speaking for the court, declared:

> "Instead of a remote cause and a separate intervening, self-sufficient, proximate cause, we have here concurrent acts, co-operating to produce the result. As this court pointed out in Washington & G. R. Co. v. Hickey, 166 U. S. 521, 525, 41 L. Ed. 1101, 1102, 17 S. Ct. 661, the vice of the argument consists in the attempt to separate into two distinct causes (remote and proximate) what in reality is but one continuous cause — that is to say, an attempt to separate two inseparable negligent acts which, uniting to produce the result, constituted mutually contributing acts of negligence on the part of the railroad company and the driver of the automobile.
>
> "**The negligence sought to be established against**

> **the railroad company was not only failure to sound the whistle, but operation of the train at a rate of speed dangerous and unusual, and which necessarily would bring the train into the city at a speed far beyond the limit prescribed by the city ordinance. Assuming, upon these facts, that a finding by the jury that the train was negligently operated would be justified, such negligence continued without interruption down to the moment of the accident. The same is equally true in respect of the contributory negligence of the driver of the automobile. The result, therefore, is that the contributory negligence of the driver did not interrupt the sequence of events set in motion by the negligence of the railroad company or insulate them from the accident, but concurred therewith so as to constitute in point of time and in effect what was essentially one transaction."** (Emphasis ours).

To like effect are: **Thompson & Donahoo** v. **Mobile & O. R. R. Co.**, 101 So. 441, 211 Ala. 646. **Southern R. R. Co.** v. **Shelton**, 136 Ala. 212, 34 So. 201. **Central of Ga. R. R. Co.** v. **Pruden**, 107 So. 716, 21 Ala. App. 280, all of which are discussed on pages 305-307 of this Record and to which the attention of this court respectfully is directed.

B. and C.

If the court concludes that the opinion of the Court of Appeals for the Fifth Circuit is not in error or in conflict with prior decisions of that court, and with prior decisions of other circuits, and of this court, on the question of the issue of negligence and wanton conduct, we then come to a consideration of the question whether this court, in remanding the case to the District Court,

with instructions to enter a judgment for the plaintiff, deprived the petitioner of his right to a trial by jury under the 7th Amendment, since the legal sufficiency of the evidence was not reserved by the respondent during the trial by motion for a directed verdict.

That question is one of general interest and concern which has been resolved differently by the different Circuit Courts of Appeal and is here on a record clearly presenting the basic issue so that it can be determined free from the complications of any disputed factual issues.

The question first was considered by this court long prior to the adoption of the present Federal Rules of Civil Procedure, in **Slocum** v. **N. Y. Life Ins. Co.** (1913) 228 U. S. 364, 33 S. Ct. 523, 57 L. Ed. 879, where the plaintiff brought suit on an insurance policy. The defendant's motion for a directed verdict was denied and the jury found for the plaintiff. The defendant then moved for a judgment, not-with-standing the verdict. The motion was denied but the Court of Appeals sustained the defendant's contention and entered judgment for the defendant. The plaintiff contended his right to trial by jury had been violated. This court held that the Circuit Court of Appeals was right in reversing the judgment but that it should have granted a new trial and declared that:

> " . . . Instead of ordering a new trial as was required at common law, the Circuit Court of Appeals itself re-examined the issues, resolved them in favor of the defendant, and directed judgment accordingly. This, we hold, could not be done con-

sistently with the 7th Amendment, which not only preserves the common law right of trial by jury but expressly forbids that issues of fact settled by such a trial shall be re-examined otherwise 'than according to the rules of the common law'."

Following this case, the Federal Courts held that even where a directed verdict should have been ordered for the appellant in the trial court, they could only send the case back for a new trial. **Young** v. **Central R. R. of N. J.** (1914) 232 U. S. 602, 34 S. Ct. 541, 58 L. Ed. 750. **F. W. Woolworth Co.** v. **Davis** (CCA 10th 1930) 41 F. 2d 342. **Sucrerie Central Coloso De Porto Rico** v. **Fajardo** (CCA 1st 1918) 248 F. 432.

In **Baltimore & Carolina Line Co.** v. **Redman** (1935) 295 U. S. 654, 55 S. Ct. 890, 79 L. Ed. 1636, the plaintiff brought an action in the Federal District Court to recover damages for personal injuries while in defendant's employ. At the close of the evidence, the defendant moved for a directed verdict and a dismissal of the complaint on the ground that the evidence was insufficient to sustain a verdict for the plaintiff. The court reserved decision on these motions and submitted the case to the jury who returned a verdct for the plaintiff. Thereafter, the court denied the defendant's motions and entered judgment for the plaintiff. On appeal, the Circuit Court of Appeals held the evidence insufficient to support a verdict for the plaintiff and ordered a new trial rather than directing a verdict for defendant, citing the **Slocum** case as authority. The defendant obtained certiorari and this court held that since the trial court had reserved decisions on the motions of defend-

ant, the Circuit Court of Appeals upon a finding of insufficiency of the evidence could have directed a proper judgment rather than reverse the case for a new trial. The **Slocum** case was distinguished on the ground that there the court had no reservation of power to grant or deny subsequent to the jury verdict a motion for a directed verdict.

This court, speaking through Mr. Justice Van Devanter, who also wrote the opinion in the **Slocum** case, observed that:

> "In that case (Slocum), the defendant's request for a directed verdict was denied without any reservation of the question of the sufficiency of the evidence or of any other matter; and the verdict for the plaintiff was taken unconditionally and not subject to the court's opinion on the sufficiency of the evidence."

The court noted that:

> "A very different situation is disclosed in the present case. The trial court expressly reserved its ruling on the defendant's motion to dismiss and for a directed verdict, both of which were based on the apparent insufficiency of the evidence to support a verdict for the plaintiff."

The court substituted a judgment of dismissal on the merits in place of the direction for a new trial.

In the **Redman** case, the court had reserved a ruling on defendant's motion for a directed verdict and after verdict had denied the motion. On appeal, it was held that the trial court had erred in its failure to allow the

motion for a directed verdict and that there was thus presented a question of law. There had been no such reservation in the **Slocum** case as appeared in the **Redman** case. In the **Redman** case, the court observed that they had held in the **Slocum** case that the Court of Appeals "could not itself determine the issues of fact and direct a judgment for the plaintiff for this would cut off plaintiff's unwaived right to have the issues of fact determined by a jury."

Except to the extent that the rule of the **Slocum** case is qualified by the **Redman** case, it is still the law. It is obvious, therefore, that in the case here pending, no direction for the entry of judgment should have been given and the Court of Appeals could properly have done nothing but remand the case for a new trial.

In **Aetna Ins. Co.** v. **Kennedy** (1936) 301 U. S. 389-57 S. Ct. 809, 81 L. Ed. 1177, the plaintiff brought suit on insurance policies. It was stipulated that the loss was $11,000. The petitioner requetsed a directed verdict which the District Court denied. The jury found for the defendant and the plaintiffs filed a motion for a new trial but did not move for judgment, not-withstanding the verdict. The Circuit Court of Appeals held that the trial court erred in refusing plaintiffs moion which reversed the case and ordered a new trial, but on rehearing, the court remanded the case with directions to enter judgment for the plaintiff. On certiorari, this court held that the Circuit Court of Appeals "rightly reversed the judgments of the District Court but erroneously directed judgments for the plaintiff" and declared:

"The Circuit Court of Appeals had jurisdiction to reverse and remand for new trial, but without power consistent with the 7th Amendment to direct the trial court to give judgment for the plaintiff and as before submission of the case to the jury, the trial court denied plaintiff's motion for directed verdicts without reserving any question of law, neither that court nor the Circuit Court of Appeals had jurisdiction to find or adjudge that, not-with-standing the verdicts, plaintiff was entitled to recover. Slocum v. N. Y. Life Ins. Co. 228 U. S. 364, 57 L. Ed. 879, 33 S. Ct. 523. Our decision in Baltimore & Carolina Line Co. v. Redman, 295 U. S. 654, 79 L. Ed. 1636, 55 S. Ct. 890, is not applicable."

The rule appears to be clearly established that in case of reversal of a judgment entered on a verdict, the direction of the appellate court should be for a new trial unless there was a reservation of ruling on the question of the sufficiency of evidence through motion for a directed verdict in the trial court. Rule 50 (b) of the Federal Rules of Civil Procedure makes the reservation automatic when the motion is filed. However, there still exists a conflict among the Circuit Courts of Appeal over the jurisdiction to direct entry of judgments on reversal where the legal sufficiency of the evidence is reserved by the appellant in the trial court by motion for a directed verdict.

The Courts of Appeal for the 4th and 7th Circuits in reversing the District Courts, on occasion, have directed the entry of judgments where motions for directed verdicts were filed in the trial court and overruled. In the 8th and 10th Circuits, they have declined to do

so on the ground that it would deprive the litigant of his right to trial by jury under the 7th Amendment to the Constitution.

In **Brunet** v. **S. S. Kresge Co.** (CCA 7th 1940), 115 F. 2d 713, the court noted the distinction between the **Slocum** and the **Redman** cases and the effect of Rule 50 (b) of the Federal Rules of Civil Procedure on the principle of these cases. In the **Brunet** case, the plaintiff sued to recover damages sustained as the result of the defendant's alleged negligence. At the close of the evidence, the defendant moved for a directed verdict which was taken under advisement and following a verdict for the plaintiff, the motion was denied. The defendant appealed from a judgment for the plaintiff and urged that the District Court erred in denying its motion for a directed verdict. The Court of Appeals, 7th Circuit, reversed and remanded the cause with direction to dismiss on the merits and on rehearing, the appellee (plaintiff) contended that in not at least remanding for a new rial, she was denied her right for a trial by jury under the 7th Amendment to the Constitution. The court held that the question was properly reserved and that the directed entry of judgment was proper and ruled that:

> "As to the direction to dismiss, appellee contends that in not at least remanding for new trial, we deny her the right of trial by jury guaranteed by the Constitution of the United States. She relies upon two decisions of the United States Supreme Court in support of her contention, Slocum v. New York Life Ins. Co., 228 U. S. 364, 33 S. Ct. 523, 57 L. Ed. 879, Ann. Cas. 1914 D, 1029, and

Aetna Ins. Co. v. Kennedy, 301 U. S. 389, 57 S. Ct. 809, 81 L. Ed. 1177. In the Slocum case, the Court laid down a very general rule that in case of the reversal of a judgment entered on a verdict which the appellate court found should be vacated for insufficiency of evidence to support it, the direction of the appellate court should be for new trial rather than for the entry of a judgment for the defendant not-with-standing the verdict. This rule was subsequently modified by the same court in Baltimore & Carolina Line v. Redman, 295 U. S. 654, 55 S. Ct. 890, 79 L. Ed. 1636. The court based its express modification of the earlier ruling on a distinction which it found between the two cases, in that in the earlier, there had been no reservation of the ruling on the motion for a directed verdict, whereas in the Redman case, the ruling had been expressly reserved until after verdict when the court ruled on the sufficiency of the evidence. The Supreme Court held that this presented a question of law rather than a question of fact, and that the Circuit Court of Appeals for the Second Circuit was in error in remanding for a new trial instead of directing dismissal of the cause on the merits. This distinction was adverted to in the Aetna case, and the decision in the Redman case was held inapplicable on the ground that there had been no reservation of ruling."

"Here, motion was duly made for the directed verdict, which was taken under advisement and later denied. Without the new Rule, (50) (b) of the Federal Rules of Civil Procedure, this would undoubtedly bring the case within the purview of the Slocum case, and we would be required to remand for new trial. However, within ten days after reception of the verdict, appellant filed two motions, one to set aside the verdict and for new

trial, and the other to set aside the verdict and enter judgment not-with-standing the verdict. Both were duly denied, and judgment entered on the verdict. We think this action of the defendant preserved its rights under the Rule, so that it is now entitled to direction of a judgment without new trial. When the Supreme Court decided the Redman case, it ordered that the judgment of the Court of Appeals be modified by substituting a direction for a judgment of dismissal on the merits in place of the direction for a new trial. It had previously stated that this judgment of dismissal would be the equivalent of a judgment for the defendant on a verdict directed in its favor."

In **U. S.** v. **Holliday** (CCA 4th 1941), 116 F. 2d 812, suit was filed on behalf of Holliday, a non compos mentis, on a war risk insurance policy. At the close of the case, the Government moved for a directed verdict. The motion was denied without any express reservation of decision, and the jury found for the plaintiff. The Government did not move to have the judgment and verdict set aside, but did not file a motion for a new trial which was overruled. In remanding the case to the District Court with directions to enter judgment for he Government, the Court of Appeals, 4th Cricuit, declared:

"We think it would have been the course of wisdom in the instant case for the Government to make n the lower court the motion for judgment, not-with-standing the verdict."

In **Douglas Aircraft Co.** v. **Kerns** (CCA 10th 1947), 164 Fed. 2d 1007, the plaintiff sued to recover damages for the pollution of a stream. The defendant's motion for a directed verdict and new trial were denied. The

court observed that: "It is difficult for us to see how the plaintiff could recover under the admitted uncontroverted facts" but citing the **Slocum** case concluded that:

> "We can do no more than reverse and remand with instructions to grant a new trial."

In **Millers Mut. Fire Ins. Assn. v. Warrood,** (CCA 8th 1938) 94 F. 2d 741, suit was filed on an insurance policy and the defendant moved for a directed verdict. The court reserved its ruling on the motion. After verdict for the plaintiff, the court denied the motion for judgment, not-with-standing the verdict. The appellant urged reversal and entry of judgment in their favor. The court reversed the case but refused to direct entry of judgment observing that there had been factual questions for decision by the jury.

In **Millers Mut. Fire Ins. Assn. of Ill. v. Bell** (CAA 8th 1938) 99 F. 2d 289, the plaintiff sued on an insurance policy. At the close of the evidence, the defendants moved for a directed verdict. The court reserved the right to rule on that motion after verdict and submited the case to the jury which found for the plaintiff. The court then overruled the motion for a directed verdict. On appeal, the 8th Circuit remanded the case for "further proceedings". The plaintiffs construed this as meaning a new trial and the defendant as requiring the District Court to enter a judgment for $45 which was held to be due. The District Court entered an order granting the new trial and the defendant filed a petition in the Court of Appeals for mandamus to

vacate that order and to require the entry of judgment. The Court of Appeals denied the petition and declared that:

> "The ruling in Slocum v. New York Life Ins. Co. supra, was to the effect that in an action at law, a Federal Appellate Court may set aside a verdict for error of law and order a new trial, but that, because of the 7th Amendment to the Constitution of the United States, it may, in itself determine the issues of fact, and that upon the setting aside of the verdict of a jury, there arises the same right to trial of the issues of fact by jury which existed in the first instance."
>
> "In referring to the Slocum case, in Baltimore & Carolina Line v. Redman, supra, the Supreme court . . . held that, where in an action at law the trial court has reserved the right to rule, after verdict, upon motions to dismiss and for a directed verdict based upon the insufficiency of the evidence, and has, after verdict, denied such motions, an appellate court should, upon a reversal of the judgment, due to the insufficiency of the evidence to sustain the verdict and the failure of the court to grant the motion for a directed verdict, direct judgment and not order a new trial.
>
> "Except to the extent that the rule of the Slocum case is qualified by that of the Redman case, it is still the law, and it is, therefore, obvious that this court, after holding that the Redman case was inapplicable in Millers Mut. Fire Assn. of Ill. v. Warrood, 94 F. 2d 741, and that no direction for the entry of judgment might be given, could have done nothing but remand the case for a new trial."

In the trial of this case in the District Court, prior

to argument to the jury, the Court, on its own motion, extended to the parties the right to dictate motions into the record at a later time and reserved its "ruling on such motions" (R. 256). The respondent did not dictate any motion for a directed verdict into the record and never assigned any grounds therefor, but within the ten day period, did file a "motion to set aside the verdict and judgment and for entry of judgment in favor of the plaintiff" (R. 274). Here we do not even have the question of the sufficiency of the evidence properly reserved. The ineluctable fact is the respondent never availed itself of the right extended by the court and accordingly did not reserve the question.

We submit that a litigant should not have his right to a new trial foreclosed without having had the benefit of the trial court's judgment on the question. Particularly is this true where there remain issues of fact to be determined which have never been passed upon by a jury as in the case here presented involving, as it does, the assessment of damages.

In **Tennant** v. **Peoria & Pekin Union R. Co.** (1943) 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520, the petitioner sued to recover for the alleged wrongful death of her husband under the Federal Employer's Liability Act. On appeal, the Court of Appeals, as here, held that the District Court should have directed a verdict for the defendant or allowed its motion, not-with-standing the verdict. This court granted certiorari—

> "Because of important problems as to petitioner's right to a jury determination of the issues of causation."

In holding that such an order or reversal deprived the petitioner of a right to a jury trial, this court, speaking through Mr. Justice Murphy, declared:

> "Courts are not free to re-weigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable. Upon an examination of the record, we cannot say that the inference drawn by this jury that respondent's negligence caused the fatal accident is without support in the evidence. Thus, to enter a judgment for respondent, not-with-standing the verdict, is to deprive petitioner of the right to a jury trial. No reason is apparent why we should abdicate our duty to protect and guard that right in this case."

As noted by this court in **Mut. Bur. Health & Acc. Assn. v. Thomas** (CCA 8th) 123 F. 2d 353:

> "It is only where a litigant has made motion for a directed verdict that he may ask the court to enter judgment non obstante verdicto. It is only in this manner that the question may be examined as a question of law. To ask the court to enter a judgment, contrary to a general verdict of the jury where no motion for a directed verdict has been interposed, is simply to ask the court to re-examine the facts already tried by the jury and this the court may not do without violating the 7th Amendment."

Under the established principles set out in the cases above discussed, it is submitted that in all of the circuits where these cases arose, the Circuit Courts of Appeal would have felt bound to reverse the case here

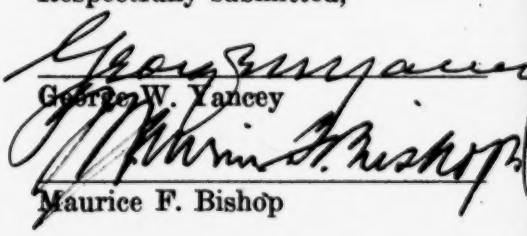
pending with directions for a new trial since the record here involved shows that no motion for a directed verdict was ever dictated or filed in the record even though the learned Trial Court extended the right to do so to parties of record. As noted in the decisions above, to direct the District Court to enter a judgment contrary to the general verdict of the jury where no motion for a directed verdict was interposed is simply to direct the court to re-examine facts already tried by the jury, and, as noted, this violates the 7th Amendment to the Constitution of the United States.

We submit, therefore, that the decision below is in conflict with prior decisions of that court and with prior decisions of other circuits and of this court on the basic question of the negligence, contributory negligence and wantonness and further that when the Court of Appeals reversed the judgment of the District Court for the defendant and remanded the case with directions to enter a monetary judgment for the plaintiff, the petitioner was denied his constitutional right to trial by jury under the 7th Amendment.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that a Writ of Certiorari should be granted, and the judgment below should be reversed, or in the alternative, that the opinion and mandate of the Court of Appeals, Fifth Circuit, should be modified to provide for a new trial before a jury, demanded by the petitioner.

Respectfully submitted,



George W. Yancey

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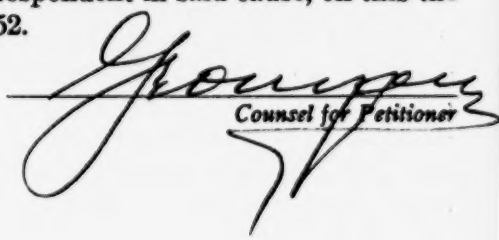
CERTIFICATE

I hereby certify that I have served a copy of the foregoing petition for Writ of Certiorari and Brief in Support Thereof, on Hon. PEYTON BIBB, of Counsel of Record for the Respondent in said cause, on this the 3rd day of May, 1952.



Counsel for Petitioner

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

No. 50

J. OWEN ROBINS, Individually, and Doing Business Under the Name and Style of ROBINS TRANSFER COMPANY,
Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,
a Corporation,
Respondent.

REPLY BRIEF AND ARGUMENT ON BEHALF OF RESPONDENT.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

No. 751.

J. OWEN ROBINS, Individually, and Doing Business Under the Name and Style of ROBINS TRANSFER COMPANY,
Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,
a Corporation,
Respondent.

REPLY BRIEF AND ARGUMENT ON BEHALF OF RESPONDENT.

THE OPINIONS BELOW.

The opinion of the Court of Appeals, Fifth Circuit, is reported in 192 F. 2d 657; the original opinion of the Court of Appeals is set out in the Record (R. 309) and the amendment concerning directions as to cargo and freight loss is set out in the Record (R. 312).

The judgment of the District Court, for the Southern Division of the Northern District of Alabama, thereafter entered on January 11, 1952, pursuant to the mandate of the Court of Appeals and express waiver and disclaimer by Respondent (Plaintiff) of all claim for damages to cargo and freight, is shown in the Record (R. 313).

STATEMENT OF THE CASE.

The Petitioner's statement is neither adequate nor entirely accurate.

For the first time in this litigation the Petitioner now takes the astonishing position that there was no motion in the Trial Court for directed verdict or for judgment notwithstanding the verdict. Since this unsupported new contention is sought to be made the fulcrum of his Petition, we will first set out the proceedings following completion of the evidence on the trial in the District Court.

A. The Orders and Judgments of the District Court and the Court of Appeals.

Contrary to Petitioner's contention, at the conclusion of all the evidence Respondent moved the Court to direct a verdict in its favor (R. 256, 274). The Trial Court, in keeping with the normal practice to avoid delay, ruled from the bench that the Court was considering all motions made which the Attorneys for either side desired to make and present at that time, with leave to file them of Record later, and that the Court reserved its rulings on all such motions (R. 256).

The verdict was entered September 20, 1950 (R. 273).

Within ten days thereafter the Respondent (Plaintiff) in compliance with this Order of the Trial Court and the Rules [Rule 50 (b), Federal Rules of Civil Procedure] further implemented its motion that the Court direct a verdict of the jury in its favor by specification of particular grounds and, at the same time, made its proper Motion that the Trial Court set aside the verdict of the jury and the judgment entered thereon and enter a judgment for the Respondent (Plaintiff) notwithstanding the verdict (R. 274).

At the beginning of the trial Counsel for Respondent (Plaintiff) and Petitioner (Defendant) agreed and stipulated in writing filed in the cause (R. 12-13) that the Respondent's (Plaintiff's) loss and damage to its property as a direct result of the derailment in question, exclusive of cargo and freight damage, was $24,630.66.

On Respondent's appeal from the adverse ruling of the District Court (R. 279), the Court of Appeals properly held that, under the Alabama decisions and the applicable Alabama statute and municipal ordinances, the negligence of the Petitioner's agent was the sole proximate cause of the collision and resultant damage to Respondent (Plaintiff) (R. 311, 290), and remanded the cause to the District Court with directions to enter judgment for the Respondent (Plaintiff), as it had so properly moved, for the amount of damages as formally stipulated by the parties.

Thereupon Respondent filed a Motion to Clarify Direction as to Amount of Damages (R. 292) contending that the judgment should include the loss and damage to its freight and cargo, asserting the same to be in the liquidated and certain amount of $5,623.65. This Motion was denied in part and granted in part to the extent that the Court of Appeals amended its order so as to direct the District Court to enter judgment for Respondent (Plaintiff) for the amount of its damage as so stipulated plus such amount of cargo and freight loss as the District Court should appropriately determine the Respondent (Plaintiff) sustained (R. 312), presumptively by Writ of Inquiry to determine the amount of any damages in addition to that formally stipulated by the parties in Court as above set out.

After the Mandate went down, the District Court entered judgment for Respondent and against Petitioner for the amount of damages previously stipulated, formal waiver and disclaimer being filed for the unstipulated portion of

the damages (R. 313). Petitioner made no motion to set this judgment aside or to appeal therefrom.

On February 25, 1952, Petitioner filed in this Court his request for extension of time for filing Petition for Writ of Certiorari, which was that day granted (R. 314).

At no time, either in the District Court or the Court of Appeals, did the Petitioner make any objection or raise any point regarding the action of the District Court in reserving judgment on Motions for directed verdict or otherwise at the close of the evidence (R. 256) **or regarding the Respondent's express, formal implementation thereof and insistence thereon by proper record action within ten days after reception of the verdict** (R. 274).

B. **The Record Facts on the Merits of the Action.**

The merits of this action and the effect of the clear and undisputed evidence are governed entirely by the decisions of the Alabama Courts and the applicable Alabama statutes, state and municipal.

On the basis of the evidence in the Record and the pictorial evidence, the originals of which were separately certified to it (R. 280), the Court of Appeals found the controlling facts to have been "overwhelmingly" established (R. 289-290).

Not only is such finding by the Court of Appeals "overwhelmingly" established; a reading of the evidence in the printed record here will show that the following facts **are established without any material conflict** by the testimony of all the witnesses for both parties (Record references being illustrative and not intended to be all-inclusive):

1. That the driver of Petitioner's truck, in good health and with no impairment of eyesight or hearing (R. 225, 244, 245), had just loaded the Petitioner's forty-foot gaso-

line tank truck with gasoline at the oil terminal, as he had done many times previously, and was proceeding along the usual and customary route of travel between the oil terminal and Petitioner's place of business (R. 29, 30).

2. The morning was clear and the sun shining, although not particularly brightly (R. 22).

3. At the grade crossing of the street and Respondent's tracks there were the following physical warnings:

(a) A regular cross-arm railroad crossing sign,

(b) A stop sign,

(c) A regular State Highway Department stop sign, and

(d) A crossing flasher red light with two electric lights giving alternating red warning flashes (R. 113, 114).

4. That these warning signals and signs at the crossing were clearly visible to and seen by a motorist, who was traveling immediately behind Petitioner's truck, continually from a distance of nearly 700 feet before reaching the crossing (R. 99, 100), and under all the evidence were unquestionably visible to a motorist approaching as was Petitioner's driver, at all times within about 300 feet before reaching the crossing in question (R. 76, 77, 96, 102, 103).

5. That the flashing red warning crossing lights, indicating the immediate approach of a train, were flashing when a motorist approached and crossed the crossing immediately before the approach and arrival of Petitioner's truck (R. 65); and were so flashing and indicating immediate approach of a train during all the time of approach of Petitioner's truck for nearly 700 feet (and for over 300 feet as an irreducible minimum) and until at and

after the moment Petitioner's truck struck the engine of the train on the crossing (R. 100, 77).

6. That during all the time the Petitioner's truck approached within 600 to 700 feet of the crossing the Respondent's train of 58 cars was also approaching the crossing (being about the same or a little greater distance from it as the truck), and during all such time and up to the moment of impact loud blasts of the whistle on the engine were being blown and the bell on the engine was steadily ringing (R. 77, 82, 94, 99, 102); that the track on which Respondent's train was approaching was straight for about 900 feet before reaching the crossing (R. 176).

7. That during all the time Petitioner's truck approached within 600 to 700 feet of and reached the crossing, a motorist traveling immediately behind Petitioner's truck clearly saw and heard the approaching train (R. 99, 100, 102, 106), and that for a minimum of about 300 feet of the last approach to the crossing the approaching train (which was unquestionably approaching the crossing on a straight track at roughly the same relative distance from the crossing as was Petitioner's truck) could have been seen, in whole or in major part, by a motorist approaching as was Petitioner's driver (R. 65, 96, 83, 102, 103); and during such time five witnesses, other than the engineer and conductor, who were in the immediate vicinity, heard the whistle or the bell, or both.

8. That under these circumstances the Petitioner's driver traveling about 25 miles per hour and acting in the line and scope of his employment (R. 8), drove the Petitioner's truck into the zone of danger of Respondent's immediately approaching train at the grade crossing, which was located within the city limits of the City of Birmingham, without stopping for the crossing and drove Petitioner's truck into the left front side of Respondent's engine, which was then on and proceeding over such crossing (R. 106, 101, 83, 211, 213).

9. That Petitioner's truck struck the Respondent's diesel engine with such force that the wheels of the engine on the opposite side from the blow of the truck made sharp visible kinks in the 100 pound steel rails of the track (R. 54, 136) (Plaintiff's Exhibit No. 9, R. 135), the engine wheels being derailed in the street, causing the engine and 16 cars to be derailed and wrecked, the railroad track to be torn up for several hundred feet and resulting in damage to Respondent's property and equipment, stipulated and agreed to be in the amount of $24,630.66 plus the additional liquidated and certain amount of net loss and damage to cargo of shippers actually paid out by Respondent at time of trial in the net amount of $5,623.95 (R. 153, 154), after allowing all salvage credit, or a total direct loss and damage to Respondent in the amount of $30,254.61.

10. That in approaching and reaching the crossing on the occasion in question the Respondent's train was traveling at the speed of 31 miles per hour (R. 176).

The traffic ordinances of the City of Birmingham pertinent to this occurrence and of which the Courts take judicial knowledge and as here called to the attention of the Trial Court were as follows: Section 1317 of the 1944 Code of the City of Birmingham, which is as follows:

> "It shall be unlawful for any driver or operator of a vehicle to cause or suffer such vehicle to enter upon or cross any railroad tracks in the city unless he shall have first brought such vehicle to a complete stop within twenty feet of such railroad tracks."

And Section 1009 (c), which is as follows:

> "It shall be unlawful for any engineer, conductor or other person in charge of a railroad train, locomotive or car to cause or permit such train, locomotive or car to proceed at a greater rate of speed than 20

miles an hour while approaching within 150 feet of any public street grade crossing outside the area mentioned in subsection (a) of this section; provided, that this subsection shall not apply to crossings of boulevards."

The pertinent statute of the State of Alabama applicable to this matter is Section 6 (b) of Title 36, Code of Alabama of 1940. It is as follows:

"6. **Warning signals at grade crossings must be obeyed.**—(b) Whenever any person driving a vehicle approaching a highway and interurban or steam railway grade crossing, and a clearly visible and positive signal gives warning of the immediate approach of a railway train or car, it shall be unlawful and constitute a misdemeanor for the driver of a vehicle to fail to bring the vehicle to a complete stop before traversing such grade crossing."

The intimation on page 5 of Petitioner's Brief that "Whether the whistle of the train blew for the crossing or for the truck, and whether the bell on the train was ringing at the time of the collision were facts disputed • • •" is untrue. That these signals were given is wholly without dispute in the record. So much so that in the course of the trial the trial judge directed that no further cumulative evidence be put on regarding warning signs and signals (R. 113-114).

THE ARGUMENT.

A. The Procedural Questions.

Here the Petitioner requests this Court to issue a Writ of Certiorari to review the action of the Court of Appeals, Fifth Circuit, upon the **representation** that, despite the clear record showing to the contrary, there was no proper Motion by Respondent in the trial in the District Court that the Court direct a verdict in its favor, and no compliance with Rule 50 (b), Federal Rules of Civil Procedure.

This argument is here made for the first time in the course of this litigation. No such contention was made by Petitioner in the District Court, and no exception was taken to the District Court's order (R. 256) embracing such motion and reserving decision. Nor was such a contention intimated on original submission in the Court of Appeals nor in Petitioner's Application for Rehearing in that Court (R. 296). Neither was any such objection raised in the District Court in the proceeding on mandate after remand (R. 313).

This exercise in semantics by Petitioner in criticizing the procedure of the District Court and the Court of Appeals is too late. As observed by this Court in Baltimore & Carolina Line v. Redman, 295 U. S. 654, 79 L. ed. 1636 (79 L. ed. 1639):

> "No objection was made to the reservation or this mode of proceeding, and they must be regarded as having the tacit consent of the parties."

More important, however, Petitioner's contention is refuted by the record facts (R. 274; 256).

All of which is expressly shown of record as follows (R. 274 et seq.):

"Comes now the Plaintiff, Atlantic Coast Line Railroad Company, and shows unto the Court that, as the record shows, at the conclusion of the evidence on the trial in this action, Plaintiff made its proper motion that the Court direct a verdict of the jury in its favor, on the grounds hereinafter more particularly set out, which motion was then and there considered and taken under advisement by the Court in keeping with the rules with direction that the grounds be later set out of record, now therefore, the Plaintiff moves the Court to set aside the verdict of the jury herein returned on to-wit the 19th day of September, 1950, in favor of the Defendant, and the judgment of the Court herein that day entered thereon in favor of the Defendant on Plaintiff's claim and to enter herein a judgment in favor of the Plaintiff and against the Defendant, and as grounds therefor assigns the following separately and severally:"

* * * * * * * *

(Followed by catalog of specific grounds variously to the effect that as a matter of law under the evidence the Plaintiff was entitled to recover and that there was no adequate support for any defense therein, and that the negligence of defendant's agent was the sole proximate cause of the collision.)

There could hardly be any more express and clear compliance with the efficient provisions of Rule 50 (b), Federal Rules of Civil Procedure, which are as follows:

"(b) Reservation of Decision on Motion. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has

moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

This was obviously the view taken by the Court of Appeals below, in directing that judgment be entered for the Respondent (Plaintiff), having rightly held that under the Alabama law the negligence of the Petitioner's (Defendant's) agent was the sole efficient proximate cause of the collision and Respondent's damage. In this connection, of course, it will be remembered that **the amount of damages in question had been formally stipulated of record by the parties** (R. 12-13).

This was no denial of trial by jury contrary to the provisions of the 7th Amendment to the Constitution of the United States. The action was expressly in keeping with the fundamental rules and rights of the parties as recognized by Rule 50 (b) prescribed to govern the procedure of District Courts. Apart from the formalizing of the procedure in Rule 50 (b), the action of the Court of Appeals was expressly in keeping with the prior decisions of this Court, Baltimore and Carolina Line v. Redman, 295 U. S. 654, 79 L. ed. 1636, wherein this Court expressly held

such procedure to be the proper course and expressly qualified its prior decision in Slocum v. New York Life Ins. Co., 228 U. S. 364, 57 L. ed. 879, to the extent that it might afford an inference to the contrary. Compare: Montgomery Ward & Co. v. Duncan, 311 U. S. 243, 85 L. ed. 147.

There is no necessity that these clear requirements be again considered by this Court on the equivocal representations here made by Petitioner.

Petitioner does not, and cannot, complain of the amount of the damages embraced in the judgment ordered entered against him by the direction of the Court of Appeals. The amount of damages in question and sustained by Respondent (Plaintiff) as a direct result of the collision and derailment caused by Petitioner's Agent **was formally stipulated of record by Petitioner and Respondent in writing filed and acknowledged in court at trial** (R. 12-13). The amount of the judgment thereafter rendered against Petitioner on mandate of the Court of Appeals (R. 313) was for the same amount—$24,630.66.

In short, all the contentions now urged upon this Court by Petitioner as the essential basis of his Petition for Writ of Certiorari are moot, academic and without record support.

Moreover, Petitioner made no effort to stay the mandate of the Court of Appeals and made no effort to review the judgment of the District Court entered pursuant to the mandate (R. 313). It thus appears that Petitioner has acquiesced in the judgment and that this Petition is really filed for delay only.

The questions decided by the Court of Appeals on the merits of the controversy are controlled by the law of Alabama, as exemplified in its decisions and statutes, state and municipal. Any variance between the decision of the

Court of Appeals in this case on these questions and other decisions of Courts of Appeals on even comparable questions affords no basis to request this Court to issue a writ of certiorari here. Ruhlin v. New York Life Ins. Co., 304 U. S. 202, 82 L. ed. 1290. The only other decision of the Court of Appeals, Fifth Circuit, to which Petitioner refers, Lowery v. Seaboard Airline R. Co., 171 F. (2d) 625, **dealt exclusively with and was controlled by the statutory and common law of the State of Florida.**

B. The Merits of the Controversy.

The Petition here presents no proper occasion for this Court to review and re-evaluate the effect of the evidence. It involves exclusively the law of Alabama, under the clear requirements of which the Court of Appeals held the evidence to show as a matter of law that the negligence of the agent of Petitioner was the sole proximate cause of the crossing accident in question.

However, any such review will show that the material controlling facts stated in the opinion of the Court of Appeals are established without dispute by the evidence—the witness for both parties and the pictorial evidence, the originals of which were certified to the Court of Appeals. These essential facts have been briefly set out above in this brief.

It is not believed necessary to review the testimony of each witness at length. Upon its review of the evidence, the Court of Appeals concluded (R. 311; 290):

> "Considering the overwhelming weight of the evidence that the Appellee's driver did not take any precaution in approaching the crossing and was heedless of the danger to himself, to the train, and its crew, it is clear that the driver's negligence was the sole proximate cause of the collision and the damages resulting therefrom. Hines v. Cooper, 205 Ala. 70, 88 So. 133;

> Southern Railway Co. v. Miller, 226 Ala. 366, 147 So. 149; Roberts v. Louisville & Nashville Railroad Co., 237 Ala. 267, 186 So. 457; Sec. 6 (b), Title 36, Alabama Code of 1940; Sec. 1317, City Code of the City of Birmingham, Alabama (1944)."

This was the correct application of the applicable law of Alabama to the evidence.

What essential general duties rested upon the Petitioner's driver as he approached the crossing of Respondent's railroad track on the occasion in question?

The first and paramount duty was to stop his vehicle before reaching the track and to look and to listen for approaching trains before attempting to effect a crossing.

Even apart from municipal ordinances or statutory provisions applicable to particular situations, this has long been the established law of Alabama. In this connection attention is invited to the clear statement of the requirement made by the Supreme Court of Alabama in Southern Ry. Co. v. Randle, 221 Ala. 435, 128 So. 894, as follows:

> "It is established by our decisions that one who is about to cross a railroad track must stop so near to the track, and his survey by sight and sound must so immediately precede his effort to cross over it, as to preclude the injection of an element of danger from approaching trains into the situation between the time he stopped, looked, and listened and his attempt to proceed across the track. The law thus imposes a continuing duty to see that the way is clear before attempting to cross." (Authorities cited.)

And this positive duty laid upon the motorist must be effectively performed at such time and place under the particular circumstances confronting him as that he will accomplish the purpose of the law—that he thus avoid, as

he can, causing accident, injury and damage to others as well as himself. This also is clearly stated by the Supreme Court of Alabama in Southern Railway Co. v. Summers, 232 Ala. 417, 168 So. 179 (180), as follows:

> "It is equally clear on principle and authority that this duty must be performed at such time and place with reference to the particular situation in each case as will enable the traveler to accomplish the purpose the law has in view in its imposition upon him. He must stop so near to the track, and his survey by sight and sound must so immediately precede his effort to cross over it, as to preclude the injection of an element of danger from approaching trains into the situation between the time he stopped, looked, and listened and his attempt to proceed across the track."

This particular accident occurred within the city limits of the City of Birmingham, Alabama, and by its proper ordinance this duty of the motorist to stop is made absolute, and the failure of the motorist to stop his vehicle within twenty (20) feet of the track is a positive violation of the City ordinance. The ordinance, embodied as Section 1317 of the City Code of the City of Birmingham (1944), is as follows:

> "It shall be unlawful for any driver or operator of a vehicle to cause or suffer such vehicle to enter upon or cross any railroad tracks in the city unless he shall have first brought such vehicle to a complete stop within twenty feet of such railroad tracks."

The material and controlling facts are essentially without dispute under the evidence.

As clearly shown by the Record, it is undisputed:

1. That the driver of Petitioner's truck, in good health and with no impairment of eyesight or hearing (R. 225;

244; 245), had just loaded the Petitioner's forty-foot gasoline tank truck with gasoline at the oil terminal, as he had done many times previously, and was proceeding along the usual and customary route of travel between the oil terminal and Petitioner's place of business (R. 29; 30).

2. The morning was clear and the sun shining, although not particularly brightly (R. 22).

3. At the grade crossing of the street and Respondent's tracks there were the following physical warnings:

(a) A regular cross-arm railroad crossing sign,

(b) A stop sign,

(c) A regular State Highway Department stop sign, and

(d) A crossing flasher red light with two electric lights giving alternating red warning flashes (R. 113; 114).

4. That these warning signals and signs at the crossing were clearly visible to and seen by a motorist, who was traveling immediately behind Petitioner's truck, continually from a distance of nearly 700 feet before reaching the crossing (R. 99; 100), and under all the evidence were unquestionably visible to a motorist approaching as was Petitioner's driver, at all times within about 300 feet before reaching the crossing in question (R. 76; 77; 96; 102; 103).

5. That the flashing red warning crossing lights, indicating the immediate approach of a train, were flashing when a motorist approached and crossed the crossing immediately before the approach and arrival of Petitioner's truck (R. 65); and were so flashing and indicating immediate approach of a train during all the time of approach of Petitioner's truck for nearly 700 feet (and for over 300 feet as an irreducible minimum) and until at and

after the moment Petitioner's truck struck the engine of the train on the crossing (R. 100; 77).

6. That during all the time the Petitioner's truck approached within 600 to 700 feet of the crossing the Respondent's train of 58 cars was also approaching the crossing (being about the same or a little greater distance from it as the truck), and during all such time and up to the moment of impact loud blasts of the whistle on the engine were being blown and the bell on the engine was steadily ringing (R. 77; 82; 94; 99; 102); that the track on which Respondent's train was approaching was straight for about 900 feet before reaching the crossing (R. 176).

7. That during all the time Petitioner's truck approached within 600 to 700 feet of and reached the crossing, a motorist traveling immediately behind Petitioner's truck clearly saw and heard the approaching train (R. 99; 100; 102; 106), and that for a minimum of about 300 feet of the last approach to the crossing the approaching train (which was unquestionably approaching the crossing on a straight track at roughly the same relative distance from the crossing as was Petitioner's truck) could have been seen, in whole or in major part, by a motorist approaching as was Petitioner's driver (R. 65; 96; 83; 102; 103); and during such time five witnesses, other than the engineer and conductor, who were in the immediate vicinity, heard the whistle or the bell, or both.

8. That under these circumstances the Petitioner's driver traveling about 25 miles per hour and acting in the line and scope of his employment (R. 8), drove the Petitioner's truck into the zone of danger of Respondent's immediately approaching train at the grade crossing, which was located within the city limits of the City of Birmingham, without stopping for the crossing and drove Petitioner's truck into the left front side of Respondent's engine, which was then

on and proceeding over such crossing (R. 106, 101, 83, 211, 213).

9. That Petitioner's truck struck the Respondent's diesel engine with such force that the wheels of the engine on the opposite side from the blow of the truck made sharp visible kinks in the 100 pound steel rails of the track (R. 54, 136; Plaintiff's Exhibit No. 9, R. 135), the engine wheels being derailed in the street, causing the engine and 16 cars to be derailed and wrecked, the railroad track to be torn up for several hundred feet and resulting in damage to Respondent's property and equipment, stipulated and agreed to be in the amount of $24,630.66 plus the additional liquidated and certain amount of net loss and damage to cargo of shippers actually paid out by Respondent at time of trial in the net amount of $5,623.95 (R. 153, 154), after allowing all salvage credit, or a total direct loss and damage to Respondent in the amount of $30,254.61.

10. That in approaching and reaching the crossing on the occasion in question the Respondent's train was traveling at the speed of 31 miles per hour (R. 176).

In view of the undisputed evidence that as the Petitioner's truck driver was approaching this crossing on the occasion in question the red warning lights were flashing and giving positive and visible warning of the immediate approach of a train, the driver's heedless disregard of it and failure to bring Petitioner's vehicle to a stop was a clear violation also of the statutes of the State of Alabama. It was a misdemeanor. The Alabama statute is as follows [Section 6 (b), Title 36, Code of Alabama of 1940]:

> "6. **Warning signals at grade crossings must be obeyed.** * * * (6) Whenever any person driving a vehicle approaching a highway and interurban or steam railway grade crossing, and a clearly visible and

positive signal gives warning of the immediate approach of a railway train or car, it shall be unlawful and constitute a misdemeanor for the driver of a vehicle to fail to bring the vehicle to a complete stop before traversing such grade crossing."

In view of these clearly established facts and the positive duty imposed on Petitioner's driver, not only under the decisions of the Alabama Courts generally but by the positive provisions of the Ordinance of the City of Birmingham and the Statute of the State of Alabama, what was the proximate cause of the liquidated damages sustained by Respondent?

Clearly it was the negligent or wanton conduct of Petitioner's driver in driving his truck into the zone of danger from, and into the side of, Respondent's engine without stopping his truck and in heedless disregard of all the clearly visible and audible warnings. The Court of Appeals rightly held that, as a matter of law, the conduct of Petitioner's driver was the sole proximate cause of the collision.

In its decision in Hines v. Cooper, 205 Ala. 70, 88 So. 133, the Supreme Court of Alabama dealt with a claim involving damages to an automobile driven onto a crossing in the City of Atalla, Alabama, at a low rate of speed, but without stopping for the crossing, immediately ahead of the arrival of a train traveling at 25 to 30 miles per hour and which struck the automobile. There an Ordinance of the City fixed a speed limit of 6 miles per hour for the operation of trains at the crossing. In commenting upon the situation, the Supreme Court of Alabama said (page 145 of 88 So.):

"Considering the undisputed evidence as to the speed of the train and also that of the car as it approached the track, it appears appellant's counsel has demonstrated by mathematical calculation that, had

> the car been brought to a full stop only a few feet from the track, and sufficient time elapsed to look and listen, the train would have reached the crossing before the car, and the accident avoided."

Here the evidence itself overwhelmingly demonstrates without necessity of any "mathematical calculation" that had the Petitioner's driver brought his vehicle to a stop at any time within even several hundred feet of the crossing—as the Ordinance and Statute positively required him to do—the accident would not have happened.

In its decision in Southern Railway Co. v. Miller, 226 Ala. 366, 147 So. 149, the Supreme Court of Alabama dealt with a situation in which the Plaintiff ran his automobile into the side of the tank of a locomotive engine which was being backed, tank first, across a populous street crossing in a municipal area. There, too, the driver did not stop before reaching the crossing. There the Court held that the conduct of the driver of the automobile in undertaking to cross the track without stopping was the sole proximate cause of the collision. In pertinent part the Court said (page 152 of 147 So.):

> "Reduced to its last analysis, we are persuaded that Plaintiff's indifference to his duty in the premises must be held as the sole proximate cause * * *".

Here it is clear beyond doubt that the action of the Petitioner's driver in proceeding to the crossing without stopping and thus striking the left front side of the Respondent's engine, all in the face of and despite the clearly visible stop signs, cross-arm sign and steadily flashing red lights at the crossing itself and the clearly audible loud blasts of the whistle on the engine and the ringing of the bell on the engine and the visible approach of the train to the crossing was the efficient and sole proximate cause of the collision.

Here, too, it is conceded by Respondent that the speed of its train on the occasion was 31 miles per hour and that this speed was in excess of the speed limit of 20 miles per hour for trains at this crossing as fixed by the Ordinance of the City of Birmingham, Section 1009 (c) of the 1944 Code of the City of Birmingham. The speed of the Respondent's train, however, was neither the proximate cause nor a contributing proximate cause of the accident.

The Court's attention is invited to the decision of the Supreme Court of Alabama in Roberts v. Louisville & N. R. Co., 237 Ala. 267, 186 So. 457. The suit was for injuries to a passenger in an automobile which struck an engine at a street crossing in the City of Mobile. The Ordinances of the City of Mobile fixed a speed limit of 8 miles per hour for trains at the crossing in question. The evidence showed that the engine was traveling 20 miles per hour, and in violation of the Ordinances, when it reached the crossing. There the contention was made that the speed of the train, in excess of that prescribed by the Ordinances, was the proximate cause. In denying the validity of this contention and holding that the conduct of the driver was the sole proximate cause, the Alabama Supreme Court on the question of excessive speed said (page 459 of 186 So.):

> "Appellant argues that the speed of the train was a proximate cause in that, if run within the speed limit, the locomotive would not have been at this crossing at the same moment the automobile arrived at that point. This position is untenable. Such ordinance has no reference to what time a train shall pass a given crossing. There was no more occasion to expect an automobile at this crossing at one moment rather than another. Moreover, supposing a different schedule of speed had been provided and followed, just what moment this train would pass this crossing would be wholly a matter of conjecture.

"Very clearly, the test here is whether the excess speed of the train at this time and place was a proximate contributing cause of the collision."

Continuing its discussion of the matter of proximate causation and in holding the conduct of the driver of the automobile to have been the sole proximate cause, the Alabama Supreme Court in the Roberts case, supra, further said (page 460 of 186 So.):

"Here, the clear case of driving heedlessly into the passing engine, failure to stop, look and listen at a point where the approach of a train would be readily discovered, must be held, as in the Miller case, supra, the sole proximate cause.

"Surely a slow moving train is no more discernible than a fast moving one. If, as disclosed by plaintiff's witnesses, this train was not seen until the automobile was virtually on the track, to say a slow moving one would have been sooner discovered would be pure conjecture. So, also, the evidence furnishes no basis on which to find a collision would not have occurred if the train had been moving within the speed limit.

"Any causal connection between the speed and the collision is matter of pure conjecture, not the basis of a verdict." (Emphasis supplied.)

We believe unnecessary further citation of authorities to demonstrate that the conduct of the Petitioner's driver on the occasion in question, be it considered either negligent or wanton, was the sole efficient proximate cause of the collision and resultant damage sustained by the Respondent.

The Petitioner cannot be heard to undertake to excuse the negligent and wanton conduct of the Petitioner's driver on the theory that there was no positive evidence that the Petitioner's driver actually and in fact saw the stop signs, the cross-arm sign and the visible and steadily

flashing red warning lights or that he heard the loud whistle or bell of the engine or saw the visibly approaching train bearing down on the crossing.

The evidence is without dispute that the Petitioner's driver was in good physical condition, that he was suffering no impairment of vision or hearing. From the undisputed evidence of five disinterested witnesses, in addition to the engineer and conductor of the train, and from the pictorial evidence introduced as Exhibits by both parties, all these warning signs and signals at the crossing were clearly visible to a motorist approaching as was Petitioner's driver for an irreducible minimum of at least 300 feet before he reached the crossing; the signs and signals were seen by another motorist a car length behind his truck for up to 600 feet before reaching the crossing; it is established by the uncontradicted testimony of at least four disinterested witnesses that many loud blasts of the whistle of the engine were blown and heard by them as the Petitioner's driver was approaching within several hundred feet of the crossing; the pictorial and oral testimony establish that the train itself was clearly visible to the approaching motorist for many hundred feet before it reached the crossing.

It is established that the Petitioner's driver did not stop before reaching the crossing and the zone of danger from approaching trains.

Had the Petitioner's driver undertaken to testify that under these circumstances he did not see these obvious warnings, the Courts would disregard his testimony. As a matter of law and ordinary common sense, the driver could not deny seeing them or hearing the audible warnings. Attention is here invited to the decision of the Supreme Court of Alabama in Peters v. Southern Railway Co., 135 Ala. 533 (541), 33 So. 332, wherein the plaintiff sought recovery for injuries sustained by having gone on

a crossing just ahead of an approaching train but denied he saw or heard the train. The Court, in holding such denial to be without merit or effect, said (pages 540-541 of 135 Alabama):

> "When facts are admitted which conclusively establish another fact, the mere denial by a witness of the existence of the fact so established does not and should not create that material conflict in evidence which would require a submission of the issue to the jury. * * *
>
> "**Suppose the fact is conceded that the sun was shining bright and clear at a specified time, and a witness having good eyes should testify that at the time he looked and did not see it shine. Could this testimony be true?**" (Emphasis supplied.) * * *
>
> "**But, after all, in the very nature of things, it cannot be true, and hence cannot, in the law, form any basis for a conflict upon which to rest a verdict.** A man may possibly think he sees an object, which has no existence in fact, but which it may be difficult, if not impossible, to prove did not exist or was not seen. **But an object and power of sight being conceded, the one may not negative the other.**" (Emphasis supplied.)

Clearly, the operators of the train had the right to assume that the Petitioner's driver would obey the law and stop before reaching the track. On this the jury was so properly instructed in the trial court as follows (R. 266):

> "Well, on that I charge you this, that the members of the crew had a right to assume as that truck came down the road in their view that the driver would obey the law and would stop. They have a right to assume that and they were under no duty to try to stop the train or to decrease its speed until they knew, or rather until they became aware that he was not going to obey the law and not going to stop."

That clearly states the settled law of Alabama on that point. Southern Railway Co. v. Randle, supra.

Where were the operators of the train so entitled to assume the Petitioner's driver would stop? At crossings generally at such close proximity to the tracks where he "could best see and hear" warnings of an approaching train. Authorities, supra. At this particular crossing the positive provisions of the City Ordinance required the Petitioner's driver to stop within twenty (20) feet of the crossing. See 1317 of the City Code of the City of Birmingham. The operators of Respondent's train had a right to assume he would obey, and not violate, this ordinance. They also had the right to assume the driver would obey the absolute mandate of the State Statute and bring this vehicle to a complete stop. By the time it became apparent or the operators of the train became aware that the truck driver was probably not going to stop, it is obvious and clear from the evidence that the operators of the train could have done nothing which was not done in an effort to avoid the accident.

The evidence was wholly without any foundation for a justiciable contention that the operators of Respondent's train—the engineer Randall and Conductor Powers—were guilty of any wanton conduct. True, the speed of Respondent's train—31 miles per hour—was in excess of the speed limit fixed by the City Ordinance. At most this was initial simple negligence only. There was no element of wantonness in this. The trial court so recognized in its charge to the jury (R. 267). The Alabama Courts have never held that speed of a train alone—even at a "populous" crossing, and in excess of that fixed by an Ordinance—where warnings of approach were properly sounded, as here, and there were visible warnings at the crossing itself, as here, constitute wanton conduct. The speed of the train was here only a part of the conditions upon

which the conduct of Petitioner's driver in heedlessly failing to stop operated as the intervening independent cause of the disaster.

This is well illustrated by the decision of the Supreme Court of Alabama in Southern Railway Co. v. Miller, supra. As will be recalled, there, too, the motorist ran his automobile without stopping into the front corner of the engine tank as it was backing over the street, knocking off the footboard on the front corner of it. In holding an absence of wantonness on the part of the crew and that the speed of the train, even if negligent, was no more than a condition upon which the driver's negligence operated independently as the sole proximate cause, the Court said (page 152 of 147 So.):

> "Here, the plaintiff's car was never upon defendant's track, and had the speed been something less it is not at all clear the injury would have been avoided. And if negligence in this respect be conceded, it is too remote and could not be said to constitute more than a condition upon which plaintiff's negligence operated to his injury. Reduced to its last analysis, we are persuaded that plaintiff's indifference to his duty in the premises must be held as the sole proximate cause, just as it was held by this court in Southern Railway Co. v. Peters, 194 Ala. 94, 69 So. 611, and Alabama Baptist Hospital Board v. Carter (Ala. Sup.), 145 So. 443. For, as said in B. & O. R. R. Co. v. Goodman, 275 U. S. 66, 48 S. Ct. 24, 25, 72 L. ed. 167, 56 A. L. R. 645, if plaintiff found himself in an emergency, 'it was his own fault that he did not reduce his speed earlier or come to a stop.' "

Compare: Baltimore and Ohio Railroad Company v. Goodman, 275 U. S. 66, 72 L. ed. 167.

So, too, in Roberts v. Louisville and Nashville Railroad Co., supra, where a passenger in an automobile (not as

such chargeable with the negligence of the driver of it) which collided at a city crossing with a train traveling 20 miles per hour and in violation of a city ordinance prescribing a speed of 6 miles per hour, the Supreme Court of Alabama held the failure of the motorist to stop, look and listen was the sole proximate cause of the collision, saying (page 460 of 186 So.):

> "So, also, the evidence furnishes no basis on which to find a collision would not have occurred if the train had been moving within the speed limit.
>
> "Any causal connection between the speed and the collision is matter of pure conjecture, not the basis of a verdict."

The few decisions Petitioner attempts to rely on in an effort to argue that the Court of Appeals should have reached a different conclusion as to the effect of this undisputed evidence are wholly inapt. They deal with different facts and issues.

The only prior decision of the Court of Appeals, Fifth Circuit, referred to is **Lowery v. Seaboard Airline R. Co.**, 171 F. (2d) 625, under the common and statutory law of Florida regarding a crossing accident. The facts in that case, as recited in the opinion by Judge Sibley, showed the accident occurred **at night at a crossing where there were no crossing warning devices and that because of a house about sixty-seven feet from the track and a large city bus stopped between the edge of the house and the track, the driver of the automobile involved in the collision could have had only the barest glimpse of a train until she reached a point about twelve feet from the tracks.** In addition, while the engineer and fireman testified that while the whistle was blown four times for the crossing they had been specifically instructed to **"blow as calm as possible"** for that crossing. While one witness who was at the crossing testified that he heard the whistle at least

once, **none of the other witnesses who saw the train heard any warning signal from it whatever.** It is, therefore, abundantly clear that the facts in the Lowery case were so widely at variance in vital and essential particulars from the facts in this case that it can by no means be used to support the attempted argument that the opinion in this case is contrary to prior decisions of the Court of Appeals, Fifth Circuit.

The Petitioner next quotes from the opinion in **Miller v. Union Pacific R. R. Co.**, 290 U. S. 277, 78 L. ed. 285. There the Court was dealing essentially with the status of a passenger in the automobile involved in the collision in question which occurred within a few feet of the boundary of the City of St. Mary's, Kansas. From the facts recited in the Court's opinion it appeared that until the occupants of the automobile reached a point about seventy-one feet from the railroad track their backs were turned in the direction from which the train was approaching at a speed of from fifty to sixty miles per hour. The opinion of the Court states (page 288 of 78 L. Ed.): "There was evidence that the whistle was not sounded." There the facts and evidence were obviously different from the undisputed evidence in the case here. Here it was undisputed that the driver of the Petitioner's truck had clear and unimpaired view of the crossing, the flashing red lights in operation at the crossing, the signs and of the approaching train itself for many hundred feet before reaching the crossing. Here, too, the evidence was undisputed from all of the witnesses that the whistle was sounded loudly and properly and continuously for the last several hundred feet of the approach of the engine to the crossing at a speed of thirty-one miles per hour.

The Alabama decisions then referred to by Petitioner deal with the legal effect of evidence and facts vitally different in material aspects from that as shown by the record in this case.

In Thompson and Donahoo v. Mobile & Ohio R. R. Co., 101 So. 441, 211 Ala. 646, the evidence showed that the view of the track and the crossing itself was obstructed by bushes growing on the right of way. The Court said:

> "There is wide variance in the testimony of numerous witnesses as to the distance the railroad track could be seen from a point on the highway 50 feet from the crossing, viz.: 30 feet, 150 to 300 feet, 300 to 600 feet, and, one witness says, three-fourths of a mile."

The driver of the truck involved in the collision testified that when he approached the crossing he slowed down and that when he was in 20 to 25 feet of the crossing he discovered the train approaching about 200 feet away **and also testified that no signals of alarm were given by the train.** Clearly, a factual situation and a record of evidence widely different in vital respects from the case at bar here.

The decision in Southern Railway Co. v. Shelton, 136 Ala. 212, 34 So. 201, is quoted from by Petitioner but without reference to the violently conflicting evidence as to how the deceased pedestrian had been injured. Suffice it to say that the injured person was a pedestrian who was walking on or along the track at night at or near a city street crossing, at which a city ordinance required a flagman, but who was absent and not on duty. One of the crew testified that as the engine was approaching the crossing from fifty feet away the headlight of the engine, proceeding at a very low rate of speed which would enable it to be stopped within a very few feet, disclosed the deceased about the middle of the crossing of the street. There was testimony that the bell was ringing but there does not appear to be any evidence that the whistle was blown. The engine proceeded on and struck him. It is obvious that the Shelton decision has no bearing on the case at bar.

The decision of the Court of Appeals in this case was compelled by the Alabama decisions and statutes, state and municipal.

CONCLUSION.

(a) It is respectfully submitted that the procedural and jurisdictional questions sought to be presented in the Petition are moot, inapt, without record support and, under the circumstances shown in the record, filed for delay; and the Respondent moves the Court to dismiss the Petition and to assess against Petitioner such costs and damages for delay as may to the Court seem proper (Section 1912, Title 28, U. S. C. A.);

(b) That if such Petition be not dismissed by the Court as so moved, then that the decision of the Court of Appeals, Fifth Circuit, be affirmed and that such costs and damages for delay be assessed against Petitioner as may be proper in the circumstances.

All of which is respectfully submitted,

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Certificate of Service.

I, the undersigned Peyton D. Bibb, Attorney for the Respondent, hereby certify that a copy of the foregoing Reply Brief and Argument on behalf of the Respondent was served on George W. Yancey, Esquire, Attorney of Record for the Petitioner, on the 11th day of June, 1952.

Peyton D. Bibb,
Attorney for Respondent.